RECEIVED
SUPREME COURT
STATE OF WASHINGTON
09 NOV -4 PM 3:11
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 81590-9

SUPREME COURT OF THE STATE OF WASHINGTON

ALEX SALAS

Petitioner,

v.

HI-TECH ERECTORS, a Washington Corporation

Respondent.

ANSWER OF RESPONDENT TO BRIEFS OF *AMICI CURIAE* LEGAL VOICE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, CENTRO de AYUDA SOLIDARIA a los AMIGOS (CASA) LATINA, LATINO BAR ASSOCIATION OF WASHINGTON, NORTHWEST IMMIGRANTS' RIGHTS PROJECT, and THE NATIONAL EMPLOYMENT LAW PROJECT

Respondent's Counsel
Matthew T. Boyle, WSBA #6919
Thomas A. Heinrich, WSBA #19925
Mitchell, Lang & Smith
1001 4th Avenue, Suite 3714
Seattle, WA 98154
(206) 292-1212

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

I. STATEMENT OF ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

A. The arguments of *Amicus Curiae* fail to address the sole issue in the case 1

1. Public policy arguments concerning immigration are better directed to the Legislature 2
2. *Amici* ignore the central issue of this case, did the trial court abuse its discretion? 2
3. There was no abuse of discretion 2

B. While the Court of Appeals ruled correctly on the issue, its comment in dicta regarding a rule for future cases was inappropriate 3

1. The Court should limit its ruling to the facts before it 4
2. Concern regarding the effect of a ruling on domestic violence cases is unwarranted 5
3. ER 403 grounds were never raised to the trial court 5
4. The rule outlined by the Court of Appeals is unduly narrow 5
5. Case law cited by *Amici* is distinguishable 6

IV. CONCLUSION 7

TABLE OF AUTHORITIES

STATE CASES

Mutual of Enumclaw Ins. Co. v. Wiscomb
95 Wn.2d 373, 378, 622 P.2d 1234 (1980).....2

Proctor v. Huntington, 146 Wn.2d 836, 852, 192 P.3d 958 (2008)..... 1

State of Washington v. McKinney
50 Wn.App. 56, 65-66, 747 P.2d 1113 (1997).....5

Walker v. Munro, 124 Wn.2d 402, 414, 879 P.2d (1994).....4

OUT OF STATE CASES

Balbuena v. IDR Realty, LLC, 812 N.Y.S.2d 416 (2006).....3

Barahona v. Trustees of Columbia Univ., 816 N.Y.S.2d 416 (2006) 3

Cano v. Mallory Management, 760 N.Y.S.2d 816 (2003)..... 2

Gonzalez v. City of Franklin, 403 N.W.2d 747 (Wis. 1987)..... 7

*Hocza v. City of New York,*2009 WL 124701 (S.D.N.Y.)..... 5

Klapa v. O&Y Liberty Plaza Co., 645 N.Y.S.2d 281 (1996)..... 7

Majlinger v. Cassino Contracting, 802 N.Y.S.2d 56 (2005)..... 2

Maliqi v. 17 East 89th Street Tenants
880 N.Y.S. 2d 917, 923 (2009)..... 5

Oro v. 23 East 79th Street Corp., 810 N.Y.S.2d 779 (2005).....3

Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005)..... 3

Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex. App. 2003)..... 7

Villasenor v. Martinez, 991 So.2d 433 (Fla. App. 2008).....3

COURT RULES

E.R. 403..... 4

I. STATEMENT OF ISSUES

Respondent relies upon the statement of the issues as set forth in the Supplemental Brief of Respondent.

II. STATEMENT OF THE CASE

Respondent relies upon the statement of the case as set forth in the Supplemental Brief of Respondent.

III. ARGUMENT

A. The arguments of *Amici Curiae* fail to address the sole issue in the case.

Three separate briefs from numerous *Amici Curiae* have been submitted in this case which invite this Court to adopt varying rules related to the admissibility of immigration status out of concern for how such a rule would affect future and potential litigants. These briefs provide no real assistance to the Court however, as they wholly fail to address the single overriding issue before the Court. Because the question at bar relates to an evidentiary ruling the standard for review is abuse of discretion. *Proctor v. Huntington*, 146 Wn.2d 836, 852, 192 P.3d 958 (2008). This Court must decide if the trial court abused its discretion in permitting the jury to hear about plaintiff's immigration status in light of his claim for loss of future earnings.

1. *Public policy arguments concerning immigration are better directed to the Legislature.*

In advocating for the rule that each proposes, *Amici* rely on a plethora of statistics and public policy arguments. While no doubt well-intentioned, these public policy arguments should be directed to the legislature rather than this Court as it is not the function of the judiciary to determine public policy. That function rests exclusively with the legislative branch. *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 95 Wn.2d 373, 378, 622 P.2d 1234 (1980), *adhered to on rehearing*, 97 Wn.2d. 203, 643 P.2d 441 (1982).

2. *Amici ignore the central issue of this case, did the trial court abuse its discretion.*

The role of the Court in this case is limited to determining whether Judge Hayden abused his discretion in ruling that, if plaintiff chose to pursue a claim for diminished future earning capacity, his immigration status would be admissible. None of the *Amici* briefs before the Court address this question or even discuss the standard for review and thus, they should be disregarded.

3. There was no abuse of discretion.

In making the evidentiary ruling he did, Judge Hayden relied upon case law cited by both parties which universally concluded that immigration status was admissible where a claim for future earning capacity was being made. *See, e.g., Cano v. Mallory Management*, 760 N.Y.S.2d 816, 818 (2003); *Majlinger v. Cassino Contracting*, 802

N.Y.S.2d 56, 68-69 (2005); *Balbuena v. IDR Reality, LLC,* 812 N.Y.S.2d 416, 429 (2006); *Barahona v. Trustees of Columbia University*, 816 N.Y.S.2d 851, 853 (2006); *Oro v. 23 East 79th Street Corp.,* 810 N.Y.S.2d 779, 783 (2005); *Villasenor v. Martinez*, 991 So.2d 433, 436-37 (Fla. App. 2008); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

During pretrial arguments, plaintiff's trial counsel at one point argued that the defense should be entitled to impeach his client on his inconsistent answers in his deposition to the question of his immigration status. RP 5/15/06 at 18-19. During this same oral argument the trial court invited plaintiff's counsel to produce some authority which stood for the proposition that he was entitled to seek recovery for lost earning capacity yet keep his immigration status from the jury. He produced no such authority. He was given the option of foregoing his future earnings claim, which would render his immigration status inadmissible. He declined this offer. He could have sought to bifurcate the issues of liability and damages, or he could have sought a limiting instruction as to this evidence, but he failed to do so.

B. While the Court of Appeals ruled correctly on the issue, its comment in dicta regarding a rule for future cases was inappropriate.

The Court of Appeals correctly ruled that Judge Hayden did not abuse his discretion, though it then inexplicably commented on the admissibility of such evidence in future cases, a comment which could

only be considered *obiter dictum* and which amounted to an impermissible advisory opinion. *Walker v. Munro,* 124 Wn.2d 402, 414, 879 P.2d (1994). This comment from the Court of Appeals essentially launched this petition for review as the plaintiff now argues that the newly announced "rule" should be applied to him, while the myriad *Amici Curiae* have weighed in either in favor of the "rule" or arguing that it is unworkable and unfair and should instead be a bright-line rule in which immigration status is never admissible.

1. . The Court should limit its ruling to the facts before it.

A determination by this Court that the rule as outlined by the Court of Appeals, or some other bright-line rule proposed by *Amici* is appropriate, would likewise amount to an impermissible advisory opinion, a path down which this Court need and should not venture. There are reasonable arguments on both sides of this public policy debate, though Hi-Tech Erectors in not interested in joining the debate as this is not the proper forum. With all due respect, this Court should limit its ruling to the facts of the case before it. Here, the only question is whether there was an abuse of discretion by the trial court. Any concern about what effect the ruling on that issue may have on future litigants can be mitigated by making clear that the ruling is limited to the facts of the case. In this case, those facts lead to only one possible conclusion which is that the trial court acted reasonably and therefore within its discretion, in making its evidentiary ruling.

2. *Concern regarding the effect of a ruling on domestic violence cases is unwarranted.*

Amicus Legal Voice raises concerns that the admission of immigration status could lead down a slippery slope where such evidence could be used in future domestic relations cases to the detriment of abused spouses. This is a prime example of why the ruling in this case should be limited to its facts. Here, plaintiff was seeking recovery of potential future earnings making that immigration status highly relevant. No such justification exists where the question is one of domestic violence.

3. *ER 403 grounds were never raised to the trial court.*

Amici, American Civil Liberties Union of Washington (ACLU) and Washington Employment Lawyers Association (WELA) focus on ER 403 and the prejudicial effect of the evidence, ignoring the fact that plaintiff Salas never objected to the admission of this evidence under ER 403 grounds at the time of trial, effectively waiving this as possible grounds for appeal. *See e.g., State of Washington v. McKinney,* 50 Wn. App. 56, 65-66, 747 P.2d 1113 (1997).

4. *The rule outlined by the Court of Appeals is unduly narrow.*

ACLU and WELA appear to support the rule issued as *obiter dictum* by the Court of Appeals. In doing so they, as did the Appellate court, unduly narrow their focus to the question of whether the plaintiff was likely to face deportation. Even one of the cases on which *Amici* primarily rely, *Hocza v. City of New York,* 2009 WL 124701 (S.D.N.Y.) recognizes that deportation is not the sole question.

> The City may not discuss or inquire as to Hocza's immigration status with respect to the possibility that he would be deported. However, Hocza's immigration status may be relevant to the question of job opportunities he would have had in this country. The parties may therefore address Hocza's immigration status with respect to its impact on opportunities for employment in the United States.

Id. at 4. *See also, Maliqi v. 17 East 89th Street Tenants*, 880 N.Y.S. 2d 917, 923 (2009). ("Nevertheless reference to plaintiff's immigration status is rationally related to his recovery of future wages and medical expenses and as such evidence relevant to this issue will be allowed at trial.")

5. Case law cited by Amici is distinguishable.

The vast majority of case law cited by ACLU and WELA relate to the question of discoverability of immigration status as opposed to admissibility. That question is not before the court, as such, the authority cited on that issue should be disregarded.

The final brief submitted by *Amici,* Centro de Ayuda Solidaria a los Amigos (CASA) Latina, Latino Bar Association of Washington (LBAW), Northwest Immigrants' Rights Project (NIRP), and The National Employment Project (NELP) argues that the "rule" adopted by the Court of Appeals is unworkable and leads to racial profiling. They seek a determination that immigration status should never be admissible. As with the other briefs, *Amici* here fail to address the question of whether the trial court abused its discretion. Moreover, the case law and authority cited by CASA et al. generally relates to the discoverability as opposed to

the admissibility of one's immigration status. In addition, those cases cited by CASA et al. which purport to stand for the proposition that courts across the country have entered protective orders keeping immigration status out of litigation (brief of *Amici* CASA et al. at 8) relate exclusively to cases which involve pay for work already performed. There is an important distinction between a claim for past wages as opposed to future earnings, where, as the cases cited at pages 2-3 of this brief make clear, immigration status is highly relevant.

It is important to note that while there are several cases around the country which have upheld a trial court's decision to admit immigration status in light of a claim for lost future earnings (see case cited at pages 2-3), and a few which upheld a trial court's decision to exclude such evidence (*See, e.g., Klapa v. O&Y Liberty Plaza Co.*, 645 N.Y.S.2d 281 (1996); *Gonzalez v. City of Franklin*, 403 N.W.2d 747 (Wis. 1987); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. App. 2003)) there is not a single case from any jurisdiction in which a trial court's admission of such evidence has been found to be an abuse of discretion. Because Judge Hayden's evidentiary ruling in this case was based on solid reasoning and supported by all of the case law cited by *both* parties, it was not an abuse of discretion and should not be overturned.

IV. CONCLUSION

The briefs of *Amici Curiae* which have been submitted in this case fail to address the central question before this Court, namely whether the

trial court abused its discretion in permitting evidence of the plaintiff's immigration status in light of his claim for lost earning capacity. Neither the case law nor the public policy arguments presented by various *Amici* address this question. The cases relied upon by *Amici* almost universally relate to discoverability as opposed to admissibility of one's immigration status and are thus not pertinent. In addition many of the authorities upon which they rely fail to consider the question of future earnings but instead deal with the issue of wages already earned.

Because Judge Hayden's evidentiary ruling was consistent with all of the case law submitted by both parties to the case, it cannot be considered an abuse of discretion. The Court of Appeals correctly ruled as such. The Court should reject the Court of Appeal's effort to propose a rule regarding admissibility of such evidence in future cases. Such a pronouncement constitutes an advisory opinion and is therefore improper.

Respectfully submitted this 4th day of November 2009.

Matthew T. Boyle, WSBA #6919
Thomas A. Heinrich, WSBA #19925
Mitchell, Lang & Smith
1001 Fourth Avenue, Suite 3714
Seattle, WA 98154
(206) 292-1212

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 NOV -4 PM 3:11

BY RONALD R. CARPENTER

CLERK

CERTIFICATE OF SERVICE BY EMAIL

I certify that I caused to be emailed, a copy of the foregoing **ANSWER OF RESPONDENT TO BRIEFS OF *AMICI CURIAE* LEGAL VOICE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, CENTRO DE AYUDA SOLIDARIA A LOS AMIGOS (CASA) LATINA, LATINO BAR ASSOCIATION OF WASHINGTON, NORTHWEST IMMIGRANTS' RIGHTS PROJECT, AND THE NATIONAL EMPLOYMENT LAW PROJECT**, on the 4th day of November 2009, to the following counsel of record at the following email addresses:

Matthew Adams
Northwest Immigrants Rights Project
615 2nd Avenue, Suite 200
Seattle, WA 98104
Email: matt@nwirp.org

Sara L. Ainsworth
Legal Voice
9071 Pine Street, Suite 500
Seattle, WA 98101
Email: sains@LegalVoice.org

Brian K. Boddy
Attorney at Law
3724 Lake Washington Blvd. NE
Kirkland, WA 98033
Email: brian@boddylaw.com

Sarah A. Dunne
Nancy L. Talner
ACLU of Washington Foundation
705 Second Avenue, 3rd Floor
Seattle, WA 98104-1799
Email: Dunne@aclu-wa.org and ntalner@aol.com

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Maria Lorena Gonzalez
P.O. Box 21134
Seattle, WA 98111
Email: gonzalez@sgb-law.com

Robert B. Kornfeld
Kornfeld Trudell Bowen & Lingenbrink PLLC
3724 Lake Washington Blvd NE
Kirkland, WA 98033-7802
Email: rob@kornfeldlawo.com

Joachim Morrison
Columbia Legal Service
300 Okanogan Avenue, Suite 2A
Wenatchee, WA 98801
Email: joe.morrison@columbialegal.org

Jeffrey L. Needle
Washington Employment Lawyers Association
119 First Avenue, S. 2nd Floor
Seattle, WA 98104
Email: jneedle@wolfenet.com

Sean M. Phelan
Frank, Freed, Subit & Thomas, LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104
Email: sphelan@frankfreed.com

Lori Rath
Rath, Law & Mediation, PLLC
1463 E. Republican Street, #B36
Seattle, WA 98112
Email: lori@rathlawmediation.com

Rebecca Smith
The National Employment Law Project
1225 S. Weller St., Suite 205
Seattle, WA 98144
Email: rsmith@nelp.org

Charles K. Wiggins
241 Madison Ave. North
Bainbridge Is., WA 9810
charlie@appeal-law.com

Matthew T. Boyle, WSBA #6919
Thomas A. Heinrich, WSBA #19925
Counsel for Respondent